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No. 83-2168

In The

Supreme Court of the United States

October Term, 1983

RUEL A. GALBREATH,

Appellant,

vs.

THE SCHOOL BOARD OF BROWARD COUNTY, FLORIDA, THE BROWARD COUNTY CLASSROOM TEACHERS ASSOCIATION, INC., and THE PUBLIC EMPLOYEES RELATIONS COMMISSION,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

MOTION TO DISMISS APPEAL

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PARENT COMPANIES AND AFFILIATES

The Broward County Classroom Teachers Association, Inc. is an employee organization affiliated with the Florida Teaching Profession-NEA, and the National Education Association.

MOTION TO DISMISS APPEAL

The Broward County Classroom Teachers Association, Inc. (CTA), an appellee in the captioned matter, moves the Court, pursuant to Rule 16.1(b), for the entry of an order dismissing the appeal on the ground that it does not present a substantial federal question, or that the federal questions sought to be reviewed were not timely or properly raised and were not expressly passed on. References to the Jurisdictional Statement filed by the appellant, Ruel A. Galbreath (Galbreath), are designated "J.S. —" or "J.S. App. —," setting forth the page of the Jurisdictional Statement or its Appendix at which the material referred to can be found.

THE FACTS ON WHICH THE MOTION IS BASED

This appeal originates in two unfair labor practice charges filed by Galbreath with the Public Employees Relations Commission (PERC). J.S. 2, 10; J.S. App. 42. PERC is an agency charged with administering Florida's Public Employees Relations Act (PERA), §447.201, *et seq.*, Florida Statutes (1981), and thereby regulating labor relations involving Florida's public employees and employers. The charge against the CTA alleged that it breached its duty of fair representation by refusing to take to arbitrate Galbreath's grievance concerning overtime pay. J.S. App. 33-34. The charge against Galbreath's employer, the School Board of Broward County, Florida (School Board), alleged that its refusal to arbitrate Galbreath's grievance, in reliance on the CTA's determina-

tion that it lacked merit, constituted an unfair labor practice. J.S. App. 37-38. Galbreath's unfair labor practice charges mention no provision of the United States Constitution. One of the charges asserts that the actions of the CTA and the School Board forced Galbreath to become a member of a labor organization, and that "[t]his result is inconsistent with principles of federal labor law and due process." J.S. App. 42.

PERC dismissed both unfair labor practice charges. J.S. App. 33-40. In so doing, it considered only the charges themselves and the evidence Galbreath submitted to support them. J.S. App. 34, 36, n. 1; 38. Viewing such evidence in the light most favorable to Galbreath, PERC nonetheless found that the CTA's decision not to pursue Galbreath's grievance "was based on its conclusion that the grievance did not constitute a violation of the collective bargaining agreement." J.S. App. 35. PERC specifically noted that "[n]o evidence was submitted which supports [Galbreath's] assertion that the [CTA's] decision was based upon Galbreath not being a member of the [CTA]." J.S. App. 34. In neither order does PERC refer to any provision of the United States Constitution.

Galbreath appealed PERC's summary dismissal of his unfair labor practice charges. In his initial brief to the Florida Fourth District Court of Appeal, Galbreath again makes no reference to the United States Constitution, only to "federal labor laws." J.S. App. 42-43. Nor does his reply brief refer to any provision of the United States Constitution; he merely states that § 447.401, Florida Statutes (1979) "on its face, is unconstitutional in that it removes the duty of fair representation from the union for nonmembers." J.S. App. 44.

The Fourth District Court of Appeal affirmed PERC's summary dismissal of Galbreath's unfair labor practice charges, making no mention of any provision of the United States Constitution. J.S. App. 17-32; Galbreath v. School Board of Broward County, 424 So.2d 837 (Fla. 4th DCA 1983). Based upon its review of the evidence in the record, the Court concluded that

> The Classroom Teachers Association found that [Galbreath's] grievance lacked merit and refused to process it through the arbitration stage. The union did not base its refusal on appellant's nonunion status.

J.S. App. 18; 424 So.2d at 838. Although it affirmed PERC's action, the Fourth District Court of Appeal certified to Florida's Supreme Court the question whether a public employer in Florida is required to arbitrate a grievance when the exclusive bargaining agent, having contractual control over the grievance procedure, determines that the grievance lacks merit. J.S. App. 18-19; 424 So.2d at 838-839.

It is in his initial brief to the Florida Supreme Court that Galbreath first makes reference to "his rights under the U.S. Constitution," along with an assertion that § 447.401 is "unconstitutional." J.S. App. 44-45. The Florida Supreme Court affirmed the decision of the Fourth District Court of Appeal, noting that the CTA, in refusing to process Galbreath's grievance to arbitration, " . . . based this decision not on Galbreath's non-union status but rather on the lack of merit in his grievance." J.S. App. 2; Galbreath v. School Board of Broward County, 446 So.2d 1045, 1047 (Fla. 1984). With respect to his claims that § 447.401 is "unconstitutional," the Court stated: "We also find Galbreath's constitutional attack on Section 447.401,

Florida Statutes (1979), to be without merit." J.S. App. 9, 446 So.2d at 1049.

Galbreath filed a motion for rehearing in which he refers to decisions involving state statutes claimed to offend the due process clause of the Fourteenth Amendment. J.S. App. 47-50. The Florida Supreme Court denied Galbreath's motion without comment. J.S. App. 11.

ARGUMENT

A. The appeal presents no substantial federal question.

It is no easy task to ascertain precisely what "federal question" Galbreath believes to exist in this case. There are repeated references in the Jurisdictional Statement to Galbreath's "constitutional attack" on § 447.401, Florida Statutes (1979), as if the meaning of those words were obvious. The terms "due process" and "equal protection" also appear, but without much elucidation. The various briefs filed by Galbreath in the state courts shed almost no light on the precise nature of the federal claims he now asserts.

The Jurisdictional Statement, however, provides some basis on which Galbreath's contentions can be discerned. We argue below that all or some of Galbreath's federal claims were not timely or properly raised below, and were not expressly considered by the Florida Supreme Court. But assuming that the claims are properly before the Court, the federal questions asserted appear to be these:

Section 447.401 is inconsistent with "Federal labor law."

Section 447.401 is unconstitutional on its face because it permits a union to refuse to process a non-member's grievance on account of his lack of union membership.

Section 447.401 violates Galbreath's due process rights because it permits the merits of his grievance to be assessed by the CTA, which is "biased" because Galbreath is not a CTA member.

None of the foregoing questions is "substantial" within the meaning of 28 U.S.C. § 1257(2).

1. "Federal labor laws" have no bearing on this appeal.

Galbreath's repeated and perplexing references to "Federal labor laws" do not create a federal question for this Court's consideration. Galbreath is employed by a public school system in Florida. "The National Labor Relations Act leaves regulation of labor relations of state and local governments to the states." Abood v. Detroit Board of Education, 431 U.S. 209, 223 (1977). Indeed, it is doubtful whether Congress could regulate such matters even if it chose to do so. *See* National League of Cities v. Usery, 426 U.S. 833 (1976). PERC and the Florida judiciary may from time to time borrow certain principles developed under the National Labor Relations Act and incorporate them into Florida law, but once adopted they are nonetheless matters of Florida law, no matter what their origin may be.

Galbreath also relies on *City of Tallahassee v. Public Employees Relations Commission,* 410 So.2d 487 (Fla. 1982) for the proposition that Florida's public employees generally enjoy the same collective bargaining rights as

private sector employees. This is no doubt true, but only because Artice I, § 6 of the Florida Constitution so provides; again, this is purely a question of state law, quite beyond this Court's jurisdiction. *E.g.* Herb v. Pitcairn, 324 U.S. 117 (1945). Whether Florida's public employees generally must or should enjoy the same rights as private sector employees is no more within this Court's province than was the wisdom of Michigan's decision to authorize the agency shop in *Abood v. Detroit Board of Education, supra*, 431 U.S. at 224-225. Unless some right derived from the United States Constitution is threatened, the existence of "Federal labor laws" does not confer jurisdiction over this appeal.

2. Galbreath lacks standing to challenge § 447.401, Florida Statutes (1979) on federal constitutional grounds.

The linchpin of Galbreath's constitutional attack on § 447.401 is that it "removes the duty of fair representation" from Florida's public-sector unions, *i.e.* it permits unions to refuse to "represent" nonmembers by refusing to process their grievances because they are not members. This is the gist of his various and ill-defined claims that § 447.401 is "unconstitutional on its face," as well as his specific claim that it denies him equal protection of the laws "by distinguishing between classes of employees (members and non-members) on a basis which is unrelated to the merits of an employee's grievance." J.A. 14.

The record conclusively demonstrates, however, that Galbreath lacks standing to press these claims. After examining only the evidence submitted by Galbreath, and viewing it in the light most favorable to him, PERC con-

cluded that the CTA's refusal to process his grievance was because it lacked merit, not because Galbreath was not a CTA member. Both the Fourth District Court of Appeal and the Florida Supreme Court reached the same conclusion on the same record. Galbreath's Jurisdictional Statement discloses no "extraordinary circumstances" which might warrant the rejection of these findings. California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc., 445 U.S. 97, 111-112 (1980). On the contrary, the findings are unassailable, and the matters of record on which they are based are similar to those which a federal district court would consider in ruling on a motion to dismiss for lack of standing. *See* Warth v. Seldin, 422 U.S. 490, 501-502 (1975).

According to Galbreath, what makes §447.401 unconstitutional is that it permits unions like the CTA to refuse to process grievances for employees because they are not CTA members. But even if this is true, Galbreath is not among those injured by the asserted unconstitutionality of § 447.401. The fact that Galbreath was not a CTA member had nothing to do with the disposition of his grievance. Nor has Galbreath shown that the CTA was in fact "biased" against him, or that any bias it might conceivably have had influenced its assessment of the merits of his grievance.

Galbreath simply cannot show that he suffered any "direct injury" as a result of the asserted unconstitutionality of § 447.401. *See* Massachusetts v. Mellon, 262 U.S. 447, 488 (1923). Although Galbreath may have been "injured" in the sense that he was denied an opportunity to have his grievance submitted to arbitration, there is no "logical nexus" between this result and the asserted con-

stitutional infirmity of § 447.401. *See* Flast v. Cohen, 392 U.S. 83, 101-102 (1968).

Even if this Court were to accept Galbreath's argument and find § 447.401 unconstitutional, Galbreath would not benefit. If the language in § 447.401 permitting unions to refuse to process non-member grievances were stricken, unions would still be free to reject grievances found to lack merit; Galbreath's grievance would still lack merit in the eyes of the CTA and it would not be submitted to arbitration. Since the result in this case would be unchanged by the declaration Galbreath seeks, there is no justiciable controversy before the Court concerning the constitutionality of § 447.401. Doremus v. Board of Education, 342 U.S. 429, 434 (1952); *cf.* Bateman v. Arizona, 429 U.S. 1302, 1305 (1976) (Rehnquist, J., Circuit Justice).

3. The CTA's authority to determine the merits of Galbreath's grievance does not abridge his due process rights.

The foregoing considerations also expose the flaw in Galbreath's claim that § 447.401 violates his due process rights by permitting the CTA, rather than an "unbiased adjudicator," initially to assess the merits of his grievance. Galbreath has simply failed to present any evidence whatsoever that the CTA was *in fact* biased against him in such a way that its treatment of his grievance was affected. *Cf.* Hortonville Joint School District No. 1 v. Hortonville Education Association, 426 U.S. 482, 491 (1976).

Galbreath claims that because he is not a CTA member, the CTA is inherently incapable of being fair and should be disqualified from passing on the merits of his grievance. Galbreath cites *Ward v. Village of Monroe-*

ville, 409 U.S. 57 (1972) and *Gibson v. Berryhill*, 411 U.S. 564 (1973) in support of this proposition. But in *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248 (1980), the Court explained that the "rigid requirements" of *Ward*,

> designed for officials performing judicial or quasi-judicial functions, are not applicable to those acting in a prosecutorial or plaintiff-like capacity. Our legal system has traditionally accorded wide discretion to criminal prosecutors in the enforcement process [citation omitted], and similar considerations have been found applicable to administrative prosecutors as well . . . .

In deciding whether to pursue a grievance to arbitration, the CTA is more akin to an "administrative prosecutor" than to an "official performing judicial or quasi-judicial functions;" indeed, a union's discretion in connection with the processing of employee grievances is well established. Vaca v. Sipes, 386 U.S. 171, 191 (1967). The "rigid requirements" of *Ward* are thus inapplicable, particularly in view of the fact that the CTA's decision was reviewable by PERC and the Florida courts. There is no claim here that PERC or the Florida courts were biased against Galbreath. Hence his due process claim is without merit.

In connection with his due process claims, Galbreath intimates that he should have been relieved of the burden of demonstrating a *prima facie* case by applying some kind of presumption that the CTA engaged in arbitrary or bad faith conduct, thereby requiring the CTA affirmately to prove its good faith. Assuming that this Court has the constitutional authority to mandate such a drastic revision of a state statute, Galbreath has shown no basis for doing so. Galbreath makes no showing that evidence of the CTA's bad faith existed but was unavailable to him. He hints

that it is impossible for a non-member to get proof that a union acted in bad faith in refusing to process his grievance, but the imagination easily yields examples: evidence that similar grievances were processed for union members; evidence that few or no grievances of any kind are ever processed for non-members; evidence that the grievance in question is clearly meritorious; general evidence of the union's animus toward non-members; etc. Had Galbreath presented evidence of bad faith on the CTA's part, PERC would have given him a hearing and, if warranted, relief. Galbreath's simple failure to present proof to support his claims is no basis for imploring this Court to rewrite Florida's public sector labor statutes.

B. The federal claims were not timely or properly raised, nor were they expressly passed on by the Florida Supreme Court.

When one seeks review in this Court of a state court judgment on the ground that the validity of a state statute was "drawn in question," 28 U.S.C. § 1257(2) requires that "the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time." Street v. New York, 394 U.S. 576, 584 (1969), *quoting* New York *ex rel.* Bryant v. Zimmerman, 278 U.S. 63, 67 (1928). Neither the element of precision nor that of timeliness is satisfied here.

We have already described the manner in which Galbreath's "constitutional" claims were presented to PERC and the court below. Galbreath's reference to § 447.401 as being "unconstitutional" is by no means a clear invocation of any federal right. Galbreath has argued that § 447.401 is "unconstitutional" because it eliminates the duty of fair

representation which prevails in the private sector. In support of this argument, Galbreath refers to *City of Tallahassee v. PERC*, 393 So.2d 1147 (Fla. 1st DCA 1981), *affirmed*, 410 So.2d 487 (Fla. 1982). But that case addresses the validity of another PERA provision in light of Article I, Section 6 of the Florida Constitution, which guarantees the right of employees to bargain collectively. Thus his claim that § 447.401 is "unconstitutional" was most likely based on the Florida Constitution. Similarly, his references to "due process" may well have been to Article I, Section 9 of the Florida Constitution, (1968) which provides, in pertinent part:

Due Process

> No person shall be deprived of life, liberty or property without due process of law . . . .

Although Galbreath does make an unexplained reference to the "U. S. Constitution" in his initial brief to the Florida Supreme Court, it accompanies a reference to Article I, Section 6 of the Florida Constitution, and is followed by an argument apparently based on the Florida constitutional provision. J.S. App. 44-45.

Assuming that Galbreath even raised a federal issue in the Florida Supreme Court by his single reference to the "U. S. Constitution," it is far from clear that the issue was passed on. The Florida Supreme Court may have addressed only the state constitutional claims in rejecting Galbreath's "constitutional attack." J.S. App. 9. Any federal claims may well have been deemed waived since they were not raised in the lower court. Smith v. Brantley, 400 So.2d 443, 445 (Fla. 1981); South Dade Farms, Inc. v. Peters, 107 So.2d 30, 32 (Fla. 1958).

This case is similar to *Webb v. Webb,* 451 U.S. 493 (1981). There, as here, no federal question was mentioned in the state court opinion under review; the Court thus assumed that "the omission was due to want of proper presentation in the state courts," 451 U.S. at 495. The Court also rejected the petitioner's attempt to show that the federal issue had in fact been raised; her references to "full faith and credit" were deemed ambiguous and, more likely than not, references to state law, even though the state constitution there had no "full faith and credit" provision. Thus the Court determined that it lacked jurisdiction to consider the appeal.

Here, an assumption that Galbreath's federal contentions were deemed waived or abandoned rests on a solid foundation of Florida law. As we have shown, no reference to the United States Constitution appears in Galbreath's unfair labor practice charges filed with PERC or in his briefs filed with the Fourth District Court of Appeal. All questions presented for appellate review must appear in the initial brief, Fla. R. App. P. 9.210(b); *Denny v. Denny,* 334 So.2d 300 (Fla. 1st DCA 1976), as must an argument on each issue. Lynch v. Tennyson, 443 So.2d 1017 (Fla. 5th DCA 1984). Nor may matters be raised for the first time in a motion for rehearing. As was noted in *Polyglycoat Corp. v. Hirsch Distributors, Inc., on rehearing,* 442 So.2d 958, 960 (Fla. 4th DCA 1984):

> It is the duty of counsel to prepare appellate briefs so as to acquaint the Court with the material facts, the points of law involved, and the legal arguments supporting the positions of the respective parties. See Re: *Estate of Barrett,* 137 So.2d 587 (Fla. 1st DCA 1962) and *Clonts v. Spurway,* 104 Fla. 340, 139 So. 896 (1932). When points, positions, facts and sup-

> porting authorities are omitted from the brief, a court is entitled to believe that such are waived, abandoned or deemed by counsel to be unworthy.

The excerpts in Galbreath's Jurisdictional Statement leave one persuaded that no federal claims were properly presented.

If the federal claims were not properly presented to the Florida Supreme Court, then Galbreath's effort to correct the defect in his motion for rehearing came too late to create jurisdiction in this Court. *E.g. Hanson v. Denckla,* 357 U.S. 235 (1958); Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945).

———o———

CONCLUSION

Based upon the foregoing, the Court is urged to dismiss the appeal for lack of a substantial federal question or because the questions sought to be presented were not timely or properly raised and were not expressly passed on.

Respectfully submitted,

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